

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
TOWN SPORTS INTERNATIONAL, Case No. 20-12168 (CSS)
LLC, et al,
824 Market Street
Wilmington, Delaware 19801
Debtors.
Monday, December 14, 2020

TRANSCRIPT OF TELEPHONIC HEARING RE:
DISCLOSURE STATEMENT APPROVAL AND PLAN CONFIRMATION
BEFORE THE HONORABLE CHRISTOPHER S. SONTCHI
CHIEF UNITED STATES BANKRUPTCY JUDGE

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INDEX

	<u>Page</u>
<u>PRESENTMENT/ARGUMENT BY MR. ALTMAN</u>	13
<u>ARGUMENT RE: OBJECTIONS</u>	
By Mr. Buchbinder	20
By Ms. Kavanagh	25
By Mr. Averbuch	33
By Mr. Loneragan	35
By Mr. Greecher	37
By Mr. Van Aalten	38
By Mr. Altman	39
<u>COMMENTS BY THE COURT</u>	43

<u>EXHIBIT</u>	<u>IDENT.</u>	<u>EVID.</u>
Didonato Declaration		11
Kjontvedt Declaration		13

1 (Proceedings commence at 2:00 p.m.)

2 THE OPERATOR: Recording has begun, we are now
3 live.

4 THE COURT: Good afternoon, everybody. This is
5 Judge Sontchi. We're here in Town Sports, Case 20-12168.

6 Just a couple of quick matters, and I'll turn it
7 over to Mr. Altman on a day that's not a Friday, which is a
8 change.

9 All of the audio has been muted on Zoom, all of
10 your audio is through CourtCall. Please mute your phones
11 when you are not speaking, that's very important, and try to
12 remember to un-mute them when you are speaking, which is also
13 important, but not as important as muting them in the first
14 place.

15 We are proceeding by Zoom, thank you for appearing
16 by Zoom. Feel free to black out your screens, if you wish;
17 however, I do require that you have your screen and camera
18 turned on if you are addressing the Court or if you are
19 testifying, either through direct examination, introduction
20 of an affidavit, cross-examination, or a proffer, so that I
21 can make sure the witness is present. If we have any
22 incidents, I will do my best to take care of them. If I
23 can't resolve them, we will continue, but we'll do it by
24 CourtCall only, and we'll terminate the Zoom portion of the
25 hearing.

1 I think that pretty much takes care of it, and I'll
2 turn it over to Mr. Altman.

3 MR. ALTMAN: Thank you, Your Honor. Josh Altman of
4 Kirkland & Ellis on behalf of Town Sports International.
5 Your Honor, can you hear me okay?

6 THE COURT: Yes, sir.

7 MR. ALTMAN: Excellent. Thank you.

8 Your Honor, the only item today on the agenda that
9 is up is approval of the debtors' disclosure statement on a
10 final basis and confirmation of the debtors' second amended
11 plan. I'm just going to fix the screen here, Your Honor.
12 There we go.

13 Your Honor, with respect to evidence, the facts and
14 circumstances supporting confirmation of the plan are set
15 forth in -- first and primarily, in the declaration of John
16 Didonato filed at Docket Number 774. Mr. Didonato is with us
17 on Zoom today. I would ask that we move his declaration into
18 evidence.

19 THE COURT: I don't see him.

20 MR. DIDONATO: Your Honor, I am -- I apologize,
21 Your Honor. John DiDonato. I'm having difficulty with Zoom,
22 gaining access. I will keep trying --

23 MR. BUCHBINDER: Yeah, Your Honor, this is Dave
24 Buchbinder. I have the same problem. I keep getting an
25 invalid meeting ID.

1 MR. DIDONATO: I do, as well.

2 THE COURT: All right. Well, then you might have
3 the wrong ID, so let's just make sure. Give me just a
4 minute. I'm doing this myself, so it takes a little longer,
5 so just give me a moment, please.

6 (Pause in proceedings)

7 THE COURT: All right. It should be Meeting 160
8 000 7545. And the passcode is 237106. We'll wait for a few
9 minutes.

10 MR. DIDONATO: Your Honor, I had that instruction.
11 It actually said invalid before you get to that step, so I'm
12 going to restart my computer and attempt to get on. I
13 apologize.

14 THE COURT: It's okay. We are going to wait --

15 UNIDENTIFIED: John, check your -- John, check your
16 email, please.

17 MR. DIDONATO: Yeah, I will.

18 MR. BUCHBINDER: Your Honor, this is Dave
19 Buchbinder. I've booted out and booted in twice and I've
20 used the original agenda and the amended agenda, and I get
21 the same problem every time.

22 THE COURT: Huh. Let me send you the link, Mr.
23 Buchbinder. Do you have access to your work email?

24 MR. BUCHBINDER: Yes, sir, I do.

25 THE COURT: Okay. I think I've got you in here.

1 After 15 years on the bench, if I haven't sent you an email
2 -- there you are, there we go.

3 MR. BUCHBINDER: Let's see if there's someone else
4 -- let's see if it works this way.

5 THE COURT: I'm sending you the email link, as
6 well. That's the one right off my page as host. We do have
7 33 people who made it on, so I'm not sure what the problem
8 is.

9 MR. BUCHBINDER: Yeah.

10 (Pause in proceedings)

11 THE COURT: Here you come.

12 (Pause in proceedings)

13 THE COURT: All right. Hello, Mr. Buchbinder.

14 Glad to have you.

15 Do we have the witness yet?

16 MR. DIDONATO: I'm rebooting, Your Honor, and
17 hopefully we'll get there momentarily. I apologize again.

18 THE COURT: All right. Certainly. Look, if -- it
19 absolutely never ceases to amaze me that we're making this
20 all work for the last nine months, so this is nothing
21 compared to what I feared back in March. So we will take our
22 time and get it done right. It will give me a chance to read
23 the pile of documents that the debtors sent over 15 minutes
24 before the hearing.

25 MR. DIDONATO: Your Honor, I apologize. It's

1 coming up invalid meeting ID minus one in parenthesis. I'll
2 keep trying, but --

3 THE COURT: No, that's all right. That's -- let's
4 do it this way. Is there any objection to the witness
5 appearing solely by audio because of exigent circumstances,
6 for purposes of admission of his direct testimony by
7 affidavit and any supplemental direct or proffer or cross?

8 (No verbal response)

9 THE COURT: All right. I hear none.

10 I am going to allow that. Generally speaking, I
11 really shouldn't, but I think, given the exigent
12 circumstances of the fact that we have 40 people on this call
13 ready to go forward with this hearing, an important hearing
14 for the debtor, and the gremlins of IT have struck, I am
15 going to allow it.

16 So, Mr. Altman, you can proceed as if your witness
17 were on the video. I think, at that -- at this point, you
18 had offered his affidavit, I believe. Wait, this might be
19 him.

20 MR. DIDONATO: I might be able to -- I'll keep
21 trying, Your Honor (indiscernible)

22 THE COURT: No, I think I see -- hang on.

23 MR. DIDONATO: Okay.

24 THE COURT: I'm letting you in.

25 MR. DIDONATO: Okay.

1 THE COURT: There you are, and you're sideways.

2 MR. DIDONATO: Yeah, I made it.

3 THE COURT: Perfect. We'll take you --

4 MR. DIDONATO: (Indiscernible)

5 THE COURT: -- any way we can get you.

6 MR. DIDONATO: I'll try getting --

7 THE COURT: Don't touch anything.

8 MR. DIDONATO: -- myself right-side up.

9 THE COURT: No, no, no.

10 MR. DIDONATO: Okay.

11 THE COURT: Don't touch anything.

12 MR. DIDONATO: All right. All right. Maybe I can
13 turn my computer sideways, Your Honor. There we go.

14 THE COURT: That's even better, now you're upside-
15 down.

16 (Laughter)

17 THE COURT: All right.

18 MR. DIDONATO: Thank you. Thank you, Your Honor.

19 THE COURT: You're welcome.

20 All right. Our witness is here. The -- any
21 objection to admission of the affidavit?

22 (No verbal response)

23 THE COURT: It's admitted without objection.

24 (Didonato Declaration received in evidence)

25 THE COURT: After all this, somebody really has to

1 ask him a question. Does anybody wish to cross-examine the
2 witness?

3 (No verbal response)

4 THE COURT: All right. I hear none and I have no
5 questions. So thank you very much. And it's good to have
6 you here because it's good to follow the Federal Rules of
7 Evidence and the Federal Rule of Civil Procedure. Very good.

8 Mr. Altman.

9 MR. ALTMAN: Thank you, Your Honor.

10 Your Honor, the voting declaration of Ms. Kjontvedt
11 from Epiq Global Solutions was filed at Docket Number 775.
12 We do have -- as I'll address in just a moment -- a
13 supplemental declaration that is being worked on that will be
14 filed. Not to steal the thunder from future me, but that
15 supplemental declaration is going to show that Class 4 did
16 vote to accept the plan.

17 For now, I propose that we move in the declaration
18 filed at 775. And then, hopefully, that will be on file --
19 hopefully, the revised supplemental will be on file prior to
20 the end of the hearing, and we'll move that into evidence, as
21 well, at that time.

22 THE COURT: All right. And I see the witness here.

23 Any objection to the admission of the declaration?

24 (No verbal response)

25 THE COURT: Okay. I hear none. It's admitted

1 without objection.

2 (Kjontvedt Declaration received in evidence)

3 THE COURT: Does anyone wish to cross-examine the
4 witness? Of course, all rights are reserved with the
5 supplemental declaration.

6 (No verbal response)

7 THE COURT: I hear none, I have no questions.

8 MR. ALTMAN: Thank you, Your Honor.

9 Your Honor, with respect to background, just to
10 level-set, we filed these cases 91 days ago, on September
11 14th. If Your Honor recalls, we came in with a bit of a
12 messy situation. We had two competing sale and DIP proposals
13 from different subsets of lenders, one that held a majority
14 of the term loan and one that did not. We also had a
15 business that was obviously affected by COVID-19, in that it
16 was gyms, and people were not allowed into them or were
17 choosing to not go to them, for risk of COVID-19 infection.

18 As Your Honor is aware, we went with the group that
19 we've been calling the "term lender group" that held 50 --
20 more than 50 percent in amount. And it was at that stage
21 that we really set out the deal and the settlement terms that
22 were the foundation of this case. We implemented the going
23 concern sale and sold the business for an eighty-million-
24 dollar credit bid, along with an agreement by the purchaser
25 to provide \$1 million to general unsecured creditors. that

1 transaction saved over a thousand jobs, kept gyms open in the
2 company's main markets, and we believe was a good outcome for
3 all constituents.

4 After the committee was appointed, but prior to
5 solicitation, we resolved the committee's plan objections by
6 building in a non-released claims trust, resulting in a
7 global settlement with the committee, the debtors, and the
8 term lender group. That non-released claims trust is with
9 respect to certain claims that were being brought by
10 Attorneys General in various states, so that the committee or
11 the liquidating trust could pursue those claims against
12 certain directors on a post-petition basis. Those claims, or
13 at least the economic benefit of those claims or the economic
14 impact of those claims -- or the pre-petition claim because
15 all of the alleged wrongdoing or claims arose pre-petition.
16 And the committee filed a statement in support of the plan at
17 Docket Number 707, recommending all general unsecured
18 creditors to vote to accept the plan.

19 Your Honor, while the plan, at this stage, is, you
20 know, essentially a liquidation plan, I wanted to provide all
21 that background because what all the parties involved here
22 believe is that we did do a successful and complete a
23 successful going concern transaction in this case. To that
24 end, I wanted to thank the various professionals that were
25 involved because that is no small feat in the current

1 situation: The committee, represented by Mr. Van Aalten and
2 Mr. Alberto at Cole Schotz; Gibson Dunn, representing the
3 term lender group, Mr. Greenberg and Mr. Goldstein; DLA
4 Piper, who represented the purchaser Mr. Chesley and Mr.
5 Grant; and Mr. Chubak from Amini, LLC, who represented the
6 purchaser kind of in the closing stages. We wanted to thank
7 all of them for their efforts getting us to where we are
8 today.

9 Your Honor, as we stand here today, as I alluded to
10 earlier, we did have an issue until about 45 minutes ago with
11 respect to Class 4 voting to accept and support the plan.
12 That -- what that issue was, we learned after filing our
13 brief, is that the lenders and Peak are still negotiating a
14 shareholders agreement. So the lenders don't technically
15 have the 20 percent equity in the purchaser entity. It was
16 that issue that was holding up them voting to support the
17 plan.

18 We included language at Paragraph 70, at Docket
19 Number 797, which is the revised form of order we filed just
20 a few moments ago you were alluding to. That language
21 clarifies that the release in the plan is only as effective
22 as between the lender group and Class 4 and the purchaser and
23 DIP lenders after that equity is distributed and they've
24 reached a mutually agreeable shareholders agreement. And the
25 release is otherwise effective as to all other parties.

1 With that, Your Honor, Mr. Goldstein, just
2 literally a minute or two before the hearing, sent over the
3 last ballots from members of his group that will, when put in
4 with all of the other ballots, show that we have a supporting
5 class by both numerosity and amount at Class 4 in all
6 debtors. So that is going to resolve any issues with resent
7 to -- with respect to cramming up the Class 4 debtors and
8 will make today go, hopefully, a lot smoother, as soon as we
9 get that on file.

10 Your Honor, I just wanted to pause and ask if Your
11 Honor had any questions with respect to that issue.

12 THE COURT: The last thing I'm going to do is ask
13 any questions about late-filed ballots in this case or any
14 other in the United States, but it sounds like it's a good
15 solution.

16 MR. ALTMAN: Thank you, Your Honor. And just to be
17 clear, we did accept all late-filed ballots; there's been no
18 picking and choosing on that front.

19 Your Honor, with respect to plan objections, as we
20 set out in the objection chart filed as Exhibit A to the
21 confirmation brief, we received very few substantive
22 objections. And we believe that all of those, with the
23 exception of two objections from the United States Trustee,
24 have been resolved.

25 With respect to the unresolved UST issues, there

1 are two issues: First is the inclusion of committee -- the
2 committee in the 9019 language, and the second is the debtor
3 being included as a released party, as that might implicate a
4 discharge.

5 I'll take the 9019 issue first. I believe that
6 we've reached a resolution with Mr. Buchbinder and the United
7 States Trustee's Office by me just confirming on the record
8 that that settlement is with the committee. That's the plain
9 language of what we wrote in the confirmation order. We are
10 not saying that any individual creditor agreed to that,
11 although they did vote overwhelmingly in support of the plan.
12 But the actual 9019 is with the committee, who we, of course,
13 believe has the right to -- as a representative -- as an
14 estate fiduciary, has the ability to settle in this case.

15 With respect to the released party issue, Your
16 Honor, the crux of the argument, as we understand it, is that
17 the debtors are not entitled to a discharge under eleven
18 forty -- is that, because the debtors are not entitled to a
19 discharge under 1141, they can't be a released party as to a
20 consensual third-party release.

21 I'll note here that there was a very-late-filed
22 objection just about an hour ago from the Attorneys General
23 for Washington and Massachusetts, joining in the United
24 States Trustee's objection on this front.

25 Your Honor, we believe this is conflating issues.

1 We worked with Mr. Buchbinder prior to solicitation to remove
2 references from an 1141 -- with respect to an 1141 debtor
3 discharge, given that this plan is effectively a liquidation
4 plan. That is a separate issue than if a third party chooses
5 to release the debtors as part of a consensual third-party
6 release. That's their prerogative, that's their contract
7 right. They could have opted out of the release; they chose
8 not to.

9 And the notion that third parties can't
10 consensually release debtors because the debtors are not
11 entitled to a discharge, frankly, misses the entire point of
12 a consensual third-party release. Debtors have been included
13 as released parties in many plans confirmed by Your Honor and
14 in courts around the country. I could list a ton of them, I
15 have several in front of me: APC Automotive, Anna Holdings,
16 EB Energy, Charming Charlie, American Bank -- commonly
17 referred to as "Horsehead Holdings" -- those were just a few
18 in front of Your Honor in the last few years.

19 With that, Your Honor, we're going to respectfully
20 request that Your Honor overrules the United States Trustee's
21 objections, as we both -- we think that both of them, both of
22 the remaining objections, are not founded in law or find
23 support in the cases that Your Honor would find binding.

24 With respect to one other objection, Your Honor --
25 this is the objection filed at Docket Number 756, by the

1 landlord at the TSI Bayonne entity. We have reached a
2 resolution with them. It is a confirmation objection, but
3 it's really resolving their first omnibus rejection motion
4 and administrative claims motion they filed.

5 The resolution involves a post-petition rent
6 allowed administrative claim of \$65,000 and payment within 5
7 business days of the effective date of a plan, an agreement
8 that the debtors can abandon property free and clear at their
9 -- at the leased premises. And with respect to leased
10 treadmills at the property, the landlord is going to
11 cooperate in facilitating the retrieval of those treadmills;
12 or, alternatively, enter into an agreement with respect to
13 those treadmills.

14 We did file a revised confirmation order. That
15 redline reflects, I believe, everything I just addressed, as
16 well as one revision -- or one modification in Paragraph 66
17 that was intended to address that we do not yet have the
18 Class 4 voting declaration on file. And so we put in a
19 construct, whereby Your Honor can enter the confirmation
20 order, and then that declaration can prove to -- you know,
21 the filing of that declaration can implement the accepting
22 voting classes; or, alternatively, we can obviously wait
23 until that declaration is on file and then have the order
24 entered, and we'll remove that language at Paragraph 66.

25 Your Honor, with respect to the other 1129 factors

1 --

2 THE COURT: Well, let's deal with the objections --
3 hang on. Let's deal with the objections, Mr. Altman.

4 Mr. Buchbinder?

5 MR. ALTMAN: Sounds great.

6 MR. BUCHBINDER: Thank you, Your Honor. Dave
7 Buchbinder on behalf of the U.S. Trustee.

8 I would agree that the remaining issues -- I would
9 go over them as twofold: A, whether or not the debtor is
10 entitled to a discharge in a liquidating case; and B, whether
11 a debtor may be considered a released party for purposes of a
12 third-party release provision.

13 Let's start with Section 1141(d). 1141(d)(3)
14 specifically tells us how a non-individual debtor -- or how a
15 debtor receives a discharge in a Chapter 11 case, and it
16 reads:

17 "Except as otherwise provided in this subsection,
18 in the plan, or in the order confirming the plan,
19 the confirmation discharges the debtor from a debt
20 that arose" --

21 I'm going to skip (a) because I'll go to (d)(3):

22 "The confirmation of a plan does not discharge a
23 debtor if:

24 "(A) The plan provides for the liquidation of all
25 or substantially all of the property of the estate;

1 "(B) The debtor does not engage in business after
2 consummation of the plan;"

3 And:

4 "(C) The debtor would be denied a discharge under
5 Section 720(a) of this title if the case were a
6 case under Chapter 7 of this title."

7 Article 9.A of this plan is entitled "Final
8 Satisfaction of Claims and Termination of Interests" and
9 begins with the preamble, "To the maximum extent provided for
10 by Section 1141(d)." Yes, the debtor removed the word
11 "discharge" from the substance of the text between the
12 original draft and the present draft, but did not change the
13 substance of the provision.

14 Section 1141(d) (3), let's work backwards through
15 it. Would this debtor be entitled to a discharge if the case
16 were a Chapter 7? No, the debtor would not because the
17 debtor is not an individual.

18 Second, did the debtor liquidate -- has the debtor
19 liquidated substantially all of its assets? By admission, it
20 has.

21 Third, is the debtor going to engage in business
22 post-confirmation? No, it is not. It has admitted as much,
23 except to wind down the affairs of the estate, and that is
24 not sufficient to provide a discharge.

25 There is no provision in the Code to allow

1 creditors in a Chapter 11 liquidation plan, as opposed to
2 reorganization plan, a vote on whether or not the debtor gets
3 a discharge. That is not one of the methods provided for by
4 Section 1141(d)(3). And this debtor would not be entitled to
5 a discharge if the case were a Chapter 7 and creditors do not
6 get to vote on a discharge in a Chapter 7 case.

7 So that next raises the question of whether the
8 debtor can propose that creditors vote for a discharge
9 directly if they voted for the plan, or whether that can be
10 done indirectly in some way.

11 Let's deal first with the directly part. Once
12 again, there's no provision for voting on it. Section 105
13 does allow the debtor to propose provisions not inconsistent
14 with the Code. Section 1123(b)(6) allows a plan to contain
15 provisions not inconsistent with the Code. But proposing
16 that debtors can vote for a discharge in a liquidation plan
17 is not among the list of options provided for by the plain
18 language of the Code.

19 Recent Supreme Court history in commercial cases,
20 in the RadLAX case, and in consumer cases, in the Law v.
21 Siegal case, have unequivocally held that you can't do,
22 through indirection, what you can't do directly. So you
23 can't use Section 1123(b)(6), and you can't use Section 105
24 to circumvent Section 1141(b)(3) or Section 727(a). If it's
25 an issue that we haven't previously argued, it doesn't make

1 it carved in stone.

2 And the fact that counsel is contending that it
3 should have been raised at the disclosure statement stage?
4 Well, it was. By agreement, everyone agreed it was a
5 confirmation issue. And if that's not the case, then we have
6 to be resolving these matters at the disclosure statement
7 stage.

8 So let's move on to whether or not the debtor can
9 receive an indirect discharge. One way is the debtors'
10 proposal that, gee, they got to vote for it. But the plain
11 language of the Code doesn't permit that.

12 So now let's take -- next look at this: Can the
13 debtor be a released party to benefit from a third-party
14 release clause? Let's look at the genesis of third-party
15 release clauses. They don't emanate because of the debtor;
16 they emanate because of nondebtors. The entire bevy of
17 litigation and debate about third-party releases emanates
18 from Section 524(e) of the Code, which reads:

19 "Except as provided in Subsection (a)(3)" --

20 Which concerns itself with joint debtors in
21 individual cases.

22 "-- discharge of a debt of the debtor does not
23 affect the liability of any other entity on or the
24 property of any other entity for such debt."

25 Well, first of all, it should be rather obvious,

1 patent, and fundamental that the debtor is not a third party.
2 And to write your plan to simply define the debtor as if the
3 debtor were a released party, it's a fantasy. It's as much a
4 fantasy as the loser of an election claiming to be the
5 winner.

6 So, by making the debtor a released party and
7 giving the creditors the opportunity to opt out or opt in, it
8 is, again, the equivalent of providing the debtor a discharge
9 in a way that the Code simply does not permit for the reasons
10 stated. The Bankruptcy Code says what it means and it means
11 what it says. It's improper to provide a debtor with a
12 discharge in a liquidating case. Article 9.A should be
13 stricken and removed with a very simple paragraph that the
14 debtor is not entitled to a discharge, or 9.A simply be
15 removed.

16 With respect to the third-party release provision,
17 we have not objected to any other aspect of it that this
18 Court would, I think, consider deeply. And if the word -- if
19 the debtors are removed from the definition of "released
20 parties," then the provision is acceptable. Thank you, Your
21 Honor.

22 THE COURT: You're welcome.

23 Does anyone else wish to be heard on this issue?

24 (No verbal response)

25 THE COURT: All right. Mr. Altman, reply?

1 MR. ALTMAN: Yes, Your Honor. Sorry, I'm just
2 having some technical difficulties myself here, Your Honor.

3 (Participants speak simultaneously)

4 UNIDENTIFIED: It sounds like someone is speaking
5 through the Zoom from the Attorney General's Office of a
6 state that I didn't quite catch.

7 THE COURT: I'm not hearing people. We're not
8 hearing people through Zoom.

9 (Participants speak simultaneously)

10 (Participants confer)

11 MS. KAVANAGH: Your Honor, this is Shennan Kavanagh
12 from the Massachusetts Attorney General's Office. Can you
13 hear me?

14 THE COURT: Yes, ma'am.

15 UNIDENTIFIED: Go for it, Shennan.

16 MS. KAVANAGH: Okay. Nancy put together an
17 argument that I will read on her behalf.

18 Good afternoon, Your Honor. Thank you for hearing
19 us. My name is Shennan Kavanagh, I'm the Deputy Chief of the
20 Consumer Protection Division at the Massachusetts Attorney
21 General's Office. And with me my CourtCall is my colleague
22 Sarah Petrie. Also, from the District of Columbia's Attorney
23 General's Office, you have Nancy Alper, Senior Assistant
24 Attorney General. And with her are Lindsay Marks and Naomi
25 Claxton, Assistant Attorneys General, representing the

1 District.

2 Due to the technological difficulties, I will
3 proceed. Is that okay with you, Nancy?

4 (No verbal response)

5 MS. KAVANAGH: Okay. Thank you very much for
6 hearing us, Your Honor. This morning, we filed a joinder to
7 the United States Trustee's objection of the confirmation of
8 the Chapter 11 plan for the same reasons that the U.S.
9 Trustee, Mr. Buchbinder, just articulated. And if I might,
10 Your Honor, I will just review our argument with you.

11 Specifically, Your Honor, for the states and the
12 District, several states and the District of Columbia have
13 brought consumer protection actions in their own State Courts
14 against the debtors. But the debtors' plan appears to be --
15 to use a term borrowed from the game Monopoly -- a "get out
16 of liability card," with respect to the exculpation and the
17 discharge and release provisions that the U.S. Trustee has
18 also objected to.

19 The plan has multiple provisions dealing with
20 releases and injunctions to protect the debtor and its
21 related parties -- including its officers, directors, and
22 managers -- from liability. In essence, the Debtor TSI is
23 seeking a discharge of all potential liability for it and its
24 insiders.

25 As Section 9.A of the debtors' first amended joint

1 Chapter 11 plan provides:

2 "To the maximum extent provided for by Section 1141
3 of the Bankruptcy Code, and except as otherwise
4 specifically provided in the plan or in any
5 contract, instrument, or other agreement or
6 document created pursuant to the plan, the
7 distribution, rights, and treatments that are
8 provided in the plan shall be complete satisfaction
9 and release, effective as of the effective date, of
10 claims, interests, and causes of action of any
11 nature whatsoever."

12 Black-letter law, however, requires that such a
13 plan be denied confirmation on the grounds that a liquidating
14 corporate debtor is not entitled to a discharge. Section
15 1141(d)(3) of the Bankruptcy Code makes clear that a
16 liquidating corporate debtor is not entitled to a discharge
17 in bankruptcy. Section 1141(b)(3) of the Bankruptcy Code
18 provides, in pertinent part, that, quote:

19 "The confirmation of a plan does not discharge a
20 debtor if:

21 "(A) The plan provides for the liquidation of all
22 or substantially all of the property of the
23 estate;"

24 And:

25 "(B) The debtor does not engage in business after

1 consummation of the plan;"

2 Here, the debtor is not an individual. It is a
3 corporate entity, which is ostensibly liquidating its
4 assets, and which will not continue in business post-
5 confirmation.

6 In addition, Your Honor, the District and the
7 Commonwealth take the position that the Debtor TSI's plan was
8 filed in bad faith, in an attempt to avoid the outstanding
9 liability for which the District, the Commonwealth, and the
10 other states have filed consumer protection lawsuits. In the
11 Attorneys General litigation, the states and the District of
12 Columbia uniformly have alleged the debtor has engaged in
13 false and misleading statements and misrepresentations
14 concerning members' rights to cancel their memberships, to
15 receive funds, and/or to transfer their memberships to gym
16 locations still open for business.

17 Membership dues and fees constitute the income
18 streams that provides Debtor TSI with the revenue necessary
19 for debtor to maintain its business operations. As Debtor
20 TSI reported in its September 2020 filing with the Securities
21 and Exchange Commission, debtor needs this cash from its
22 operations to, quote, "fund the working capital needs of its
23 business." By denying members their right to cancel or
24 modify their contract, debtor has received hundreds of
25 thousands of dollars in unearned revenue.

1 And Your Honor, this conduct of the debtor is
2 continuing to date. The Offices of these Attorneys General
3 are receiving consumer complaints from constituents
4 complaining that, for example, they have either tried to
5 cancel their membership or are still being charged or that
6 they have to tried to transfer their memberships to locations
7 of the gym that are still open, but they are denied access.
8 The debtor is still charging them membership dues.

9 In Massachusetts, Your Honor, we have received over
10 2,000 complaints since April. We've had 44 complaints come
11 in this month alone on these issues. This is the highest
12 volume of consumer complaints in a short period of time that
13 we've received, that we've seen in recent history.
14 Accordingly, Your Honor, debtor is using unearned money to
15 fund its operation.

16 It should be noted, however, that, while debtor
17 continues to receive unearned revenue by illegally
18 maintaining club memberships, six days before it filed for
19 bankruptcy protection, the debtor entered into retention
20 agreements with two of its senior officers, including Patrick
21 Walsh, its CEO, who was paid \$1.5 million by the debtor. Mr.
22 Walsh has since left employment of the debtor in or around
23 October 15th.

24 I will note, also, Your Honor, that, during this
25 time period, at the end of September going through the middle

1 of October, Patrick Walsh and his bankruptcy attorneys
2 entered into an assurance of discontinuance with the
3 Commonwealth of Massachusetts to resolve these consumer
4 protection issues short of litigation, and then reneged on
5 the agreement after telling the Commonwealth that it was
6 going to move the Bankruptcy Court for approval of the
7 agreement. And we were told that the lawyers that were
8 involved and the CEO Patrick Walsh were not, in any way,
9 armed with the authority to actually make the agreement that
10 it made with the Commonwealth.

11 And it was because of these settlement negotiations
12 and the agreement that we were promised that the Commonwealth
13 didn't sooner, with its colleague states, bring an objection
14 in this bankruptcy proceeding, either to the Chapter 11 plan
15 or the sale of the company to the new TSI. And in fact,
16 Massachusetts didn't sue TSI until later, after TSI pulled
17 the carpet out from underneath us and reneged on the
18 agreement.

19 In addition, in the Chapter 11 plan, this theme
20 continues. The debtor barely mention the Attorney General's
21 litigation. As the District and the Commonwealth have set
22 forth in their objections, debtor in its plan makes no
23 mention of our litigation, other than in the definitional
24 section of the plan, which contains over 140 defined terms.
25 Meanwhile, the debtor continues to use the money from the

1 illegally maintained club memberships to fund the working
2 capital it needs to operate its business.

3 So, under Section 1129(a)(3) of the Bankruptcy
4 Code, a court shall not [sic] confirm a plan if, quote:

5 "-- the plan has been proposed in good faith and
6 not by any means forbidden by law."

7 The District and the Commonwealth maintain that the
8 Debtor TSI's plan was not proposed in good faith, that the
9 debtor failed to bring forth the involvement that it has had
10 in several -- with several State Attorneys General since it
11 filed for bankruptcy and before it filed for bankruptcy, and
12 it was not filed in good faith; and, therefore, the
13 confirmation of the plan must be denied. Thank you, Your
14 Honor.

15 THE COURT: What's your reason again for waiting
16 until the morning of the confirmation hearing to make an
17 appearance and do anything about these complaints you've been
18 hearing about since April?

19 MS. KAVANAGH: Your Honor, we were relying on the
20 representations of bankruptcy counsel in this case. I don't
21 -- I didn't see an announcement of the appearance of the
22 bankruptcy firm that we were speaking to. The firms that
23 were speaking to us were the Olshan Frome Wolosky, LLP, and
24 Gordon Rees Scully Mansukhani. And up until the very end of
25 October and into the beginning of November, we believed we

1 had an agreement with them, and that they were going to move
2 the Court to get approval from the Court in the bankruptcy
3 proceeding.

4 We have been told by various law firms that they
5 don't represent the debtors, that they don't have authority
6 to bind the debtor. Everybody has been pointing their
7 fingers at each other, and we've been trying to work our way
8 through this long and lengthy bankruptcy proceeding to try to
9 figure out what is going on, who is in control, and who we
10 can speak to and how to be able to have a voice here. So,
11 because we have not received clarity and commitments, it took
12 us a little while to figure out how to get involved, and we
13 do apologize for our belatedness.

14 THE COURT: All right. Does anyone -- thank you
15 very much. And I apologize, Ms. Alper, I don't know what's
16 going on with regard to your connection. So I'm glad that
17 your colleague was able to speak for you.

18 Does anyone else wish to be heard on these issues
19 before I turn it back to Mr. Altman for a reply?

20 (No verbal response)

21 THE COURT: If you're trying to speak and I'm not
22 responding, just wave so I know where you are. Yes, Mr.
23 Averbuch?

24 MR. AVERBUCH: Your Honor (indiscernible) --

25 THE COURT: Averbuch?

1 MR. AVERBUCH: Yes, this is Edward Averbuch,
2 counsel for creditor Shakir Farsakh.

3 I'm not sure -- I got my audio working a bit late,
4 so I'm not sure if this would be an appropriate time to speak
5 in regards to my claim, or if this is just about the
6 Commonwealth of Massachusetts right now.

7 THE COURT: Yeah, we'll get back to you. Unless
8 your issue is related specifically to the discharge and the
9 release, we'll deal with you -- we will deal with you, of
10 course, but just not right this minute.

11 MR. AVERBUCH: It is related to the release, but
12 obviously not with regard to the Commonwealth of
13 Massachusetts. So I'll go back on mute, Your Honor.

14 THE COURT: No, no, no. Let me hear from you, let
15 me hear from you.

16 MR. AVERBUCH: Okay. Thank you.

17 My client is a personal injury plaintiff, and we
18 secured a verdict in his favor of \$750,000 a little over a
19 year ago. With interest, his claim is \$823,000. After the
20 verdict -- which, by the way, it was -- Town Sports was
21 represented by Gordon Rees. They filed for -- they filed an
22 appeal. And sometime throughout -- I think the appeal was
23 originally due in July, and they asked for an extension of
24 time. They granted it. And then, obviously, they filed for
25 bankruptcy.

1 I have a letter that I received from Kennedys,
2 which is the insurance company who -- which is the law firm
3 that represents the insurance company that insures Town
4 Sports, and I attached it as an exhibit to my objection,
5 which is Docket Number 764; the letter is 764-1.

6 In particular, that -- it states that Town Sports
7 refuses to tender the remaining portion of the five-hundred-
8 thousand-dollar self-insured retention contained in the
9 national casualty policy and relinquish control of its
10 defense in the underlying action; and therefore, the
11 insurance company denied coverage of this claim.

12 So I'm in the position here, where my client -- who
13 is severely injured -- has, it sounds like, very little
14 recourse in bankruptcy, if the plan is approved, because most
15 of his claim will be wiped out. And there's now no insurance
16 coverage, through no fault of my client. I believe that --
17 you know, and by the way, Your Honor, this letter is dated
18 July 9th, 2020, I think, you know, at a time when the debtor
19 certainly knew that this bankruptcy was impending.

20 I did reach out to counsel for the debtors in an
21 attempt to kind of work this out a little bit, and they
22 advised -- I was advised that they were not going to go back
23 to their insurance carrier and try and resolve this issue and
24 get coverage for my claim. So, because of this, I would
25 request that, you know, this plan not be approved; or,

1 certainly, at least not with regard to my client's claim of
2 \$823,000.

3 THE COURT: Did you -- did your client vote in
4 connection with the plan?

5 MR. AVERBUCH: We did not vote in. And I believe
6 there was no affirmative vote required.

7 THE COURT: Okay.

8 MR. AVERBUCH: And so my understanding is we are
9 opted out.

10 THE COURT: Okay. All right. A lot going on here.

11 Mr. Altman, if you could address, first -- oh, I'm
12 sorry. Someone else. Yes, mister -- I'm sorry --

13 MR. LONERGAN: Yes, it's Kyle --

14 THE COURT: -- Lonergan.

15 MR. LONERGAN: -- Lonergan, Your Honor.

16 THE COURT: Yep. Not Anna Lonergan? That might be
17 your spouse or --

18 MR. LONERGAN: Yes, that's my wife's computer, it's
19 (indiscernible) but it's me, Kyle Lonergan, representing the
20 Kennedy Lewis parties in the proceeding, who are creditors
21 and pre-petition lenders.

22 And I only want to comment on these last-minute
23 changes to the confirmation order, which we had not seen
24 until now. And so I'm looking at the blackline here on the
25 fly. But you know, the one thing that I need to be sure of

1 is that my party -- my clients are opt-out parties, are not
2 releasing claims in connection with the plan.

3 And previously, the form of the confirmation order,
4 I believed was pretty clear about that, in having an Exhibit
5 B and identifying my clients and stating that,
6 notwithstanding anything in the confirmation order or the
7 plan, they -- my parties would not be considered opt-out
8 parties.

9 There's new language in the confirmation order,
10 talking about various releases that are going to take place
11 in connection with the transaction, the distribution of
12 equity that was just mentioned by debtors' counsel, and that
13 the receipt of that equity wouldn't constitute a release for
14 parties who have timely objected. And then there's
15 discussion -- that's in Paragraph 70.

16 And then, in Paragraph 73, there's reference to a
17 resolution between various parties. It's unclear to me if
18 there's a -- if there's a contention here that somehow my
19 clients are a party to that resolution, and whether they're
20 deemed to have released anything.

21 But the bottom line is the new confirmation doesn't
22 have an -- there's nothing listed on Exhibit B anymore. I'm
23 not sure if those have been deleted or that's an oversight.
24 But I think the language needs to be clear in here, at least
25 with respect to my parties, the Kennedy Lewis parties, that

1 nothing in this confirmation order is releasing their claims
2 because they have validly and timely opted out.

3 And we're not going to have, you know, arguments
4 after the fact, about whether my clients validly or timely
5 did anything. We just needed that to be clear. We have an
6 agreement with the debtor about that, and I just don't want
7 there to be any ambiguity. That's really it.

8 THE COURT: All right. No problem.

9 (Participants speak simultaneously)

10 THE COURT: Thank you.

11 MR. VAN AALTEN: Your Honor, this is Seth Van
12 Aalten for the committee. May I be heard?

13 THE COURT: Hang on. Mr. Greecher wanted to -- Mr.
14 Greecher?

15 MR. VAN AALTEN: Oh, okay.

16 MR. GREECHER: Sorry. I wanted to just clarify.
17 We did file a redline earlier today. It did not include the
18 list of the opt-out parties. But to counsel's point, the
19 opt-out party exhibit has not changed. Kennedy Lewis Capital
20 Master -- Capital -- Kennedy Lewis Capital Partners Master
21 Fund, LP, and Kennedy Lewis Capital Partners Master Fund 2,
22 LP are both included on the Exhibit D of opt-out parties.

23 THE COURT: Thank you, Mr. Greecher.

24 Yes, Mr. Van Aalten?

25 MR. VAN AALTEN: Thank you, Your Honor. For the

1 record, Seth Van Aalten from Cole Schotz, counsel to the
2 committee.

3 Your Honor, the committee supports confirmation of
4 the plan today. We filed a statement to that effect at
5 Docket Number 707. The plan incorporates our settlement,
6 Your Honor, with the debtors and the term lender group,
7 through which \$1 million will be funded into the non-released
8 claims trust, for the purpose of investigating and then, if
9 appropriate, pursuing certain estate causes of action, to the
10 extent of available insurance.

11 And it's through that vehicle, Your Honor, where we
12 hope to furnish meaningful recoveries to unsecured creditors.
13 And that required concessions on the part of the debtors
14 through curtailments to certain release and injunction
15 provisions that were provided in the initial plan, as well as
16 from the term lender group, who agreed to remove its
17 approximately \$87 million in deficiency claims from the
18 unsecured creditor pool. That represented no less than 40
19 percent, and possibly as high as 80 percent of the unsecured
20 claims pool, Your Honor.

21 I did have a chance to read the late-filed joinder
22 to the U.S. Trustee's objection from the State AGs, Your
23 Honor. The committee joins in the debtors' reply to these
24 objections.

25 With respect to the State AGs objection, these are

1 pre-petition claims against the debtors, and the claims that
2 the committee was very mindful in negotiating its settlement
3 with the debtors and the term lender group to provide for the
4 non-released claims trust, Your Honor. It is the conduct
5 underlying the State AGs' claims that the non-released claims
6 trustee will be investigating and, if appropriate, commencing
7 litigation for the benefit of all unsecured creditors,
8 including customers, including personal injury claimants,
9 landlords, et cetera. And consequently, Your Honor, the
10 committee does not view the plan as an attempt to disregard
11 the AG litigation. It's certainly not an attempt to evade
12 liability.

13 This is, no doubt, the best possible result under
14 the circumstances, Your Honor, for the debtors' stakeholders.
15 The committee believes the debtors have satisfied all
16 requirements for confirmation of the amended plan today, and
17 I'd be happy to address any questions Your Honor may have.

18 THE COURT: All right. Thank you. I'm trying to
19 deal with the objections, Mr. Van Aalten, that have been laid
20 before the Court. All right? We haven't even gotten to 1129
21 factors yet.

22 Mr. Altman, do you have any response?

23 MR. ALTMAN: Yes, Your Honor. I'm going to start
24 by saying this was an incredibly challenging case. We sold
25 all of the company's remaining assets, and there is just a

1 very small amount left, and that amount was negotiated with
2 the lenders, it's a million dollars. And as Mr. Van Aalten
3 said, the committee actively represented the interests of
4 unsecured creditors.

5 So, to the issue with -- raised by the Attorneys
6 Generals, these claims are not disappearing. They're pre-
7 petition actions that give rise to pre-petition claims.
8 Parties were able to file pre-petition claims and would
9 preserve their right. Their -- the recovery --

10 THE COURT: Well, I heard --

11 MR. ALTMAN: -- for those --

12 THE COURT: -- allegations of post-petition
13 conduct.

14 MR. ALTMAN: So we (indiscernible)

15 MS. KAVANAGH: That's correct, Your Honor. There
16 is post-petition conduct at issue here.

17 THE COURT: All right. Please don't interrupt.
18 I'll interrupt, but don't interrupt. All right? Mr. Altman
19 didn't interrupt you.

20 MR. ALTMAN: Your Honor, with respect to the post-
21 petition conduct allegations -- I won't speak for Mr.
22 Didonato, he can testify to this -- but the company granted
23 \$11.5 million in credits during the case, \$850,000 in pre-
24 petition cash refunds, \$1.8 million of chargebacks, which is
25 seven times their normal run rate -- "chargebacks," meaning a

1 credit card processor charged back an amount and the credit -
2 - the company honored that. And right now, to the best of
3 the company's knowledge, there is no one that has requested a
4 refund that has not been provided for. Your Honor, I'm not
5 trying to testify here. Mr. Didonato is on. Those are just
6 the facts that he will testify to.

7 The economic claims that are post-petition, to the
8 extent they are, they can be filed as administrative claims,
9 and they will be sorted out. We don't believe there are any
10 administrative claims from this alleged misconduct. And so
11 there is no additional incremental estimate for that in the
12 administrative claims pool because we believe that we have
13 spent -- I'm just rounding here -- but 12.5, 13 -- almost \$15
14 million during the case for the benefit of parties that were
15 harmed during this time period.

16 With respect to the non-economic elements of the
17 Attorneys General's claims, the entity has been sold, so the
18 police and regulatory issues are now with purchaser. To the
19 extent current purchaser is not following any laws, that is
20 not something that the debtor entity can have anything to do
21 with.

22 I believe the last main point that was raised kind
23 of encapsulating these issues is the discharge. It's just
24 simply not a discharge, Your Honor. Indy Downs is clear that
25 the release is (indiscernible) party contract, and parties

1 can contract. Parties have the right to opt out. We have an
2 opt-out list. As counsel for Kennedy Lewis, you know,
3 explained, they did opt out. We've actually been more
4 generous in this case with allowing people to opt out than in
5 most cases because of the circumstances. Those parties that
6 sought to opt out did so by voting -- by reaching out to us
7 or objecting to the plan.

8 THE COURT: You think you've been generous with
9 allowing people to opt out? People have a right to opt out,
10 if they don't agree to the contract. They are -- it's not a
11 consensual release.

12 MR. ALTMAN: That's correct, Your Honor. I
13 misspoke in terms of generosity. With respect to time lines
14 and deadlines is what I was referring to.

15 THE COURT: All right. Well, let's deal with --
16 oh, I'm sorry. I thought you were done. I apologize. Keep
17 going.

18 MR. ALTMAN: Those -- I were just going to address
19 the other side issues, but we can handle those after this
20 one, if you want, Your Honor.

21 THE COURT: No, no, no. Why don't you give a full
22 response?

23 MR. ALTMAN: So, with respect to -- I believe with
24 Mr. Averbuch, the personal injury plaintiff, it sounds like
25 everything he's alleging -- the letter, I heard, was I

1 believe July 9th, 2020. That was obviously pre-petition. To
2 the extent he filed a claim, it sounds like they did not
3 vote. I'm not sure if they submitted a ballot to opt out.
4 If they did submit a ballot and elect to opt out, they would
5 be on the opt-out list. But other than that, his -- it's
6 obviously a pre-petition injury, pre-petition damages, and
7 they can pursue the claims process and insurance, if they
8 want to seek to lift the injunction following confirmation.

9 As Mr. Greecher noted, with respect to Mr. Lonergan
10 and Kennedy Lewis, that was just a redlining issue. The
11 Exhibit B will include Kennedy Lewis.

12 I believe I have addressed all of the issues, Your
13 Honor, that were raised, hopefully succinctly. If I missed
14 anything, I reserve my right to go back to them.

15 THE COURT: Okay. Thank you. Okay. Thank you.

16 So let me just offer some comments and tell you
17 what we're going to do. First of all, you know, Article 9 --
18 and I glanced at it as we were all having these discussions,
19 I'm certainly not as familiar with it as the parties --
20 appears -- I mean, it clearly, as revised, doesn't say
21 discharged. But it says, to the extent possible, under the
22 discharge provision.

23 I don't quite see the point in invoking the statute
24 -- invoking a section of the statute (indiscernible) that
25 gives a discharge or says when you can't get a discharge if

1 you're clearly not entitled to a discharged. Now I'm not
2 actually sure you're not clearly entitled to a discharge, but
3 I'm a little worried that the language in there might
4 preserve the right for debtors' successors or -- well,
5 debtors' successors to argue they did get a discharge and --
6 based on the fact that this language is still in the order.
7 So I kind of want to throw that out there.

8 I don't have, generally, a problem with somebody
9 saying, you know, to the extent a -- to the extent -- to the
10 greatest extent under applicable law, I'm granted a release.
11 And then we can negotiate -- we can litigate, if we have to,
12 20 years down the line, what the "greatest extent of
13 applicable law" means. And 9,999 time out of 10,000, that
14 never happens. But I am a little worried about putting
15 something in there that invokes a section that, at least
16 facially, doesn't appear to even be applicable.

17 With regard to consensual releases, I'm actually --
18 I have to say -- well, "offended" is the wrong word -- but
19 taken aback by this argument that people cannot consent to
20 give another party a release because the Code doesn't give a
21 discharge. I don't care what the Code gives. Individuals
22 have a right to contract, they have a constitutional right to
23 contract. And if they want to contract in a way that allows
24 them to give a release, that's up to them. It's not my job
25 to make sure that they're not giving away what they didn't

1 have to give away in the first place.

2 Now, using the mechanisms of the Bankruptcy Code as
3 a vehicle to achieving that release, that -- it's -- that
4 might be a little trickier, and I think maybe that's the
5 point of the argument. It's not that people don't have the
6 right to contract and give a release, but it's that we
7 shouldn't invoke, you know, the plan mechanism to provide for
8 that release when there's not going to be a discharge. I
9 think that's a tenuous argument. It's the only argument, I
10 think, that holds any water at all, possibly, under Mr.
11 Buchbinder's approach, and his other government, you know,
12 colleagues.

13 I am very worried about the allegations of the
14 Attorneys General today with regard to both pre, but more
15 importantly post-petition activity, and misrepresentations,
16 perhaps, by parties that they had the right to bind the
17 debtors while they were speaking to the Government. To say
18 that's serious is quite the understatement.

19 So -- and of course, I'm -- not -- well, I'm a
20 little flummoxed by the late appearance. But it is what it
21 is, as my colleague Judge Shannon likes to say. It is what
22 it is, we are where we are, let's eat lunch. We're not going
23 to eat lunch, but we are going to do something because I
24 don't like where we are and I don't like what it is. So
25 we're going to need some time to figure this thing out. And

1 also, I want to think about it, frankly, in the context of
2 Mr. Buchbinder and the Attorneys General's objection.

3 Now with regard to the personal injury claimant,
4 I'm a little -- sort of little -- I don't know quite what to
5 do with it. It's clearly a pre-petition claim. You might
6 have a claim against the insurance company, you might have a
7 claim against the debtor. If you have a claim against the
8 debtor, it's a pre-petition unsecured claim. And if you got
9 notice of the bar date, you needed to -- well, excuse me, not
10 the -- yeah -- no, excuse me, not the bar date. If you got
11 notice of the confirmation, you needed to do something.

12 Now you did object. I don't know about voting. Of
13 course, you're not constitutionally required to vote. You
14 don't have to vote if you don't want to vote. But if you
15 want to opt out, the way this all works, you need to take
16 some sort of affirmative action to opt out. So, if you
17 haven't opted out, it may be the case that your client is
18 potentially in a position where he or she -- and I apologize,
19 I don't know your client's gender. It doesn't really --

20 MR. AVERBUCH: He.

21 THE COURT: -- but -- he -- whether he may have --
22 he may have waived that claim, but we're not going to deal
23 with that.

24 So here's what we are going to do because there are
25 a couple of things going on here. There are some latecomers

1 that need to be engaged. There needs to be some due
2 diligence done by the debtors on what exactly happened or
3 they alleged -- was alleged to have happened. And I think
4 there needs to be some negotiation. And I'm speaking about,
5 specifically, the Attorneys General, a little less Mr.
6 Buchbinder, and maybe even a little more less Mr. Averbuch.

7 It sounds like, Mr. Lonergan, that your issues --
8 and I know the frustration of getting a last-minute redline.
9 I'm sure it's not the first one you've ever received, but it
10 sounds like your issues are preserved.

11 What I'd like to do -- and we may -- there may be
12 more we can do before this hearing is over, I'm not saying
13 the hearing is over. But these issues are going to get
14 continued, which means this portion of confirmation at least
15 is going to get continued, to allow me to think more
16 carefully on the issues, and hopefully, you guys to try to
17 figure out a path forward on a consensual basis. But if you
18 don't, you don't, and I'll make my rulings.

19 I haven't even -- you know, look, I haven't even
20 read the Attorneys General's objections, so I'm just acting
21 off of what I heard orally, or I guess aurally -- a-u-r-a-l-
22 l-y.

23 Thursday, at -- well, I hate to do this to Mr.
24 McKane on the west coast, but Thursday, at 9:30 would work
25 the best for me. I have a very full day that day, but if we

1 start early, or what I consider early, I think we'll be all
2 right. Now I know this might mess with -- does this mess
3 with -- hang on. I'm putting it on my calendar, so I don't
4 forget what I just said.

5 To the extent this messes with any deadlines or,
6 you know -- I'm not -- my head is not coming up with the
7 word, but the things lenders -- milestones. To the extent
8 this disagrees with any or interferes with any milestones, I
9 don't know what to say. That's just going to have to be what
10 it is. It's only three days, so ... all right. So that's
11 all preserved.

12 MR. ALTMAN: Your Honor --

13 THE COURT: And Mr. Altman, you're going to -- or
14 your coll -- some of your colleagues are going to engage, I
15 hope, with all the people we were speaking with, maybe
16 further with Mr. Buchbinder, further with the Attorneys
17 General, and further with Mr. Averbuch, and we'll see what we
18 have.

19 MR. ALTMAN: Yes, Your Honor.

20 THE COURT: And if you don't reach an agreement,
21 that's fine, I'll make the decision. But I'll be more
22 prepared to make a decision on Thursday.

23 MR. ALTMAN: Yes, Your Honor. My email is on all
24 of the pleadings, so if the Attorneys General group wants to
25 shoot an email to Ms. Greenblatt and myself, we will set up a

1 call this afternoon.

2 (Participants speak simultaneously)

3 THE COURT: Hang on, hang on. Mr. Buchbinder, yes.
4 I think I heard your voice, did I note?

5 MR. BUCHBINDER: This is Dave Buchbinder. I was
6 actually not speaking, Your Honor.

7 THE COURT: Oh, all right.

8 MR. BUCHBINDER: Thank you.

9 (Participants speak simultaneously)

10 THE COURT: I don't know what -- I don't know what
11 that's like.

12 (Laughter)

13 (Participants speak simultaneously)

14 THE COURT: Hang on, hang on, hang on. Yes, Mr.
15 Lonergan.

16 MR. LONERGAN: Yes, just quickly. Listen, I'm
17 happy to hear we're still on Exhibit B and that it still
18 exists. There are these new -- and I appreciate that things
19 get done at the last minute in these proceedings. I just --
20 I do want to be part of the continued engagement with the
21 debtor, just about the new language, just to make sure that
22 we can get comfort that, you know, our rights are being
23 preserved and we are opted out of the releases. But I think
24 it will be easy to do. I would like to use that time you're
25 giving us to do that.

1 MR. ALTMAN: Your Honor, we'll make sure to call
2 Mr. Lonergan and coordinate.

3 MR. LONERGAN: Thank you.

4 MR. CHUBAK: Your Honor, this is Jeffrey Chubak of
5 Amini, LLC, on behalf of Peak Credit.

6 We second the concerns (indiscernible) and we're
7 hopeful that it will reach agreement (indiscernible) also
8 (indiscernible) confirmation hearing and have an issue with
9 some of the terms articulated that the release be
10 conditioned, entry into a mutually agreeable (indiscernible)
11 agreement (indiscernible) equity is (indiscernible)
12 referenced (indiscernible) equity to the pre-petition
13 lenders, as indicated in the declaration, but do believe that
14 it should -- that the release should be conditioned on entry
15 into a shareholders agreement (indiscernible) Gibson Dunn in
16 its absolute discretion.

17 We've actually (indiscernible) advised Gibson Dunn
18 that we are going to providing a draft. I -- Your Honor, I
19 see that there's -- I'm raising --

20 THE COURT: Well, I'm --

21 MR. CHUBAK: -- this issue because

22 THE COURT: First of all, I'm having a hard time
23 hearing you. But second of all -- who do you represent
24 again?

25 MR. CHUBAK: Peak Credit, LLC, which is --

1 THE COURT: You're the buyer.

2 MR. CHUBAK: -- (indiscernible) owner. Yes.

3 THE COURT: All right. So you're not an objector.

4 MR. CHUBAK: There are provisions in the
5 confirmation order that affect us, and we learned that was
6 added 15 minutes before the hearing.

7 THE COURT: All right. All right. Well, I have --

8 MR. CHUBAK: (Indiscernible) put it over.

9 THE COURT: Yeah, absolutely, absolutely. Not a
10 problem.

11 Is there anything else, Mr. Altman? I don't
12 require you to go through the 1129 factors, you know, you
13 filed your memo, so that's more than enough. I think the --

14 MR. ALTMAN: That's all --

15 THE COURT: -- open issue --

16 MR. ALTMAN: -- I was going to say, Your Honor.

17 THE COURT: Okay. So I think the open issues for
18 Thursday are, I guess, the unresolved objections or comments
19 from Mr. Averbuch's client, Mr. Chubak's client, Mr.
20 Lonergan's client, and the Attorneys General and Mr.
21 Buchbinder. And of course any changes you've made to the
22 order right before the hearing, I think parties should have a
23 fair opportunity to comment on and object to, if they think
24 it's appropriate.

25 And maybe you'll be able to work these all out; if

1 not, I'm going to spend some time, probably tonight,
2 actually, getting up to speed. I'm going to read the
3 objections again because it's an interesting issue. If I can
4 stomach it, I'll read Indianapolis Downs again. But that's
5 kind of where I'd like to go. Does that sound okay to you?
6 I guess you don't really have a choice, you need to say yes.

7 (Laughter)

8 MR. ALTMAN: Your Honor, that is a -- that is a
9 great solution for us.

10 THE COURT: All right. Anything further for today?
11 I think that was the only motion on, if I -- the only item on
12 the agenda.

13 MR. ALTMAN: That's right, Your Honor. Everything
14 else was resolved, including the cure objections --

15 THE COURT: Yes, I say that.

16 MR. ALTMAN: -- I believe (indiscernible)

17 THE COURT: Thank you very much. And Mr. Greecher,
18 thank you for your update over the weekend, that was very
19 helpful.

20 MR. GREECHER: Of course, Your Honor.

21 THE COURT: (Indiscernible)

22 MR. GREECHER: And if I could, Your Honor --

23 THE COURT: Sorry to contact you so late.

24 MR. GREECHER: I'm always available for Your Honor.

25 One question -- or one note just as to Mr.

1 Averbuch's client. Again, apologies for not including the
2 exhibit list with the redline line that we filed this
3 afternoon. But Mr. Farsakh is included on the list of the
4 opt-out parties, so I think that that should assuage the
5 concern with Mr. Averbuch that they are a non-released/non-
6 releasing party under the plan.

7 THE COURT: Okay. Well, engage in a conversation,
8 but that's good to hear.

9 For Thursday, we're going to use the same Zoom
10 information -- sorry, Mr. Didonato -- the same ID and same
11 passcode. All right.

12 Thank you. We're adjourned.

13 COUNSEL: Thank you, Your Honor. Thank you, Judge.
14 Thank you, Your Honor.

15 (Proceedings adjourned to 12/17/20)

16 (Concluded at 3:10 p.m.)

17 *****

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.

A handwritten signature in black ink, appearing to read "Coleen Rand", is written over a horizontal line.

December 15, 2020

Coleen Rand, AAERT Cert. No. 341

Certified Court Transcriptionist

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